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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Civil No. 2018-CP-10-05675
Appellate Case No. 2024-001698

Patricia P. McGougan and Edgar McGougan,

Appellants,

v.

Richard F. Frisch, M.D., Timothy E. West, M.D.,
The Southeastern Spine Institute, L.L.C., and
Lowcountry Infectious Diseases, P.A.

Respondents.

INITIAL BRIEF OF RESPONDENTS
Dr. Frisch and Southeastern Spine Institute

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STATEMENT OF THE ISSUE ON APPEAL

Respondents Dr. Frisch and Southeastern Spine would restate the issue raised on appeal as:

I. Did the Trial Court act within its discretion in sustaining the Defendant's hearsay objection and refusing to allow the Plaintiffs' counsel to ask the Defendant Dr. West to read a paragraph from a medical treatise during his cross examination?

A. Is the evidentiary issue preserved for appeal?

1. Did the Plaintiffs assert the Rule 803(18), SCRE, learned treatise hearsay exception at trial?

2. Did the Plaintiffs assert the Rule 106, SCRE, rule of completeness argument at trial?

3. Did the Plaintiffs make a proffer of Paragraph 7 from IDSA Guidelines?

B. Does the Rule 803(18) learned treatise hearsay exception allow a plaintiff to introduce a portion of a medical treatise where the witness is a defendant treating physician who had not been proffered as an expert?

C. Does Rule 106 allow a plaintiff to introduce the language from a different portion of a medical treatise?

II. Is there any showing that the Plaintiffs' claims against the orthopedic surgeon, Dr. Frisch and his Practice were prejudiced by the hearsay ruling arising during the cross examination of Dr. West, the infectious disease consultant?

STATEMENT OF THE CASE

This medical malpractice action arises out of a course of treatment for a post-surgical infection that the Plaintiff Patricia P. McGougan (Plaintiff Patient) developed after she underwent spine surgery in August 2016. The Plaintiff Patient and her husband Edgar McGougan (Plaintiff Husband) filed a complaint in the Court of Common Pleas for Charleston County on November 30, 2018, asserting claims for medical malpractice and loss of consortium. [ROA ___; Complaint.] The named defendants are Richard F. Frisch, M.D, an orthopedic surgeon, and his practice group The Southeastern Spine Institute LLC, and Timothy E. West, M.D. and his practice group Lowcountry Infectious Diseases, P.A. Plaintiffs allege that the Defendants were negligent in failing to promptly diagnose and treat her post-operation wound infection with a sufficient course of IV antibiotics.

Dr. West and his group filed an answer denying the allegations of negligence on January 4, 2019. [ROA ___.] Dr. Frisch and his group filed an answer denying the allegations of negligence on January 11, 2019, and then filed an amended answer on February 25, 2020. [ROA ___, ___.]

The case for came for trial before the Honorable Deadra L. Jefferson, and a jury during the week of September 9-16, 2024. The jury heard testimony from the Plaintiffs and the Defendant treating physicians in addition to other treating healthcare providers. In addition, Plaintiffs presented opinion testimony from an infectious disease expert (Dr. Blass) and an expert in orthopedic surgery (Dr. Davne). Defendant Dr. West presented opinion testimony from an expert in infectious disease (Dr. Simmons). Defendants Dr. Frisch presented opinion testimony from an infectious disease expert (Dr. Dailey) and an orthopedic surgery expert (Dr. Glaser). Thus, the conflicting medical expert testimony presented the classic battle of the experts.

Both Defendants made directed verdict motions, at the close of the Plaintiffs' case and at the conclusion of all the evidence, which were both denied. [ROA ___-___; Tr. 456-76. ROA ___-___; Tr. 947-48.] At the close of the case, the Trial Judge charged the jury on the applicable legal principles[1] and the jury returned its verdict in favor of both Defendants, specifically finding that:

- The Plaintiffs did not prove by a preponderance of the evidence that Dr. Frish and Southeastern Spine Institute deviated from the standard of care; and
- The Plaintiffs did not prove by a preponderance of the evidence that Dr. West and Lowcountry Infectious Diseases deviated from the standard of care.

[ROA ___; Tr. 1140; ROA___, Verdict.]

The Plaintiffs made a post-trial motion for a new trial solely based on the 13th juror doctrine, arguing that the jury's verdict is against the manifest weight of the evidence. [ROA ___;Tr. 1143.] The Trial Judge denied the new trial motion by order filed September 27, 2024, and entered judgment on the jury's defense verdict. [ROA ___.] The Plaintiffs timely served and filed a Notice of Appeal on October 9, 2024. [ROA ___.]

STATEMENT OF THE FACTS

The Relevant Medical History

Plaintiff Patient Patricia McGougan was admitted to East Cooper Medical Center on August 2, 2016 for spinal surgery during which Dr. Frisch performed a left L4 laminectomy and L4-L5 discectomy. She was discharged from the hospital the next day with a prescription for oral antibiotics -- doxycycline 100 mg for 7 days, and instructions for follow-up in two weeks. [ROA ___; Def. Ex. 14, 16, 19.]

[1] Notably, the Plaintiffs do not raise any challenge to the jury charges on this appeal.

On August 16, 2016, the Plaintiff Patient was seen by Ryan Aprill, PA-C at Southeastern Spine for a postoperative visit. There were no signs of infection noted at that time. [ROA ___; Def. Ex. 19.] However, over the course of the next several weeks, she developed an incisional discharge and was seen at Southeastern Spine on several occasions.

Plaintiff Patient returned to Southeastern Spine on August 23, 2016, with an incisional discharge, at which time she was seen by Anne Buck, PA-C who prescribed Bactrim. [ROA ___; Ex. 21.] Plaintiff Patient returned to Southeastern Spine on August 30, 2016, for a follow-up incision check at which time she was seen by P.A. Aprill who noted a minimal amount of incision discharge and prescribed a course of oral doxycycline 100 mg. [ROA ___; Def. Ex. 22.]

She was seen again at Southeastern Spine by P.A. Aprill on September 1, 2016, who again noted a minimal amount of drainage and instructed the Patient to continue on the doxycycline. [ROA ___; Def. Ex. 23.] The Patient returned to Southeastern Spine on September 8, 2016, at which time she was seen by P.A. Aprill who noted that the incision seemed to be closing up and there was a minimal amount of drainage on the bandage. [ROA ___; Def. Ex. 24.]

On September 20, 2016, the Patient was seen by Dr. Frisch with complaints of a fever and increased pain at which time Dr. Frisch noted wound dehiscence ["separation of the wound"[2]] in the incision but no active drainage. [ROA ___; Def. Ex. 30.] Dr. Frisch had the Plaintiff Patient admitted to the hospital for an MRI scan and blood cultures to assess treatment options. [ROA ___; Def. Ex. 25.] The MRI showed a collection of fluid behind the surgical site with a differential diagnosis of postoperative infection or small seromas[3]. [ROA ___; Def. Ex. 29.]

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[2] Per testimony of Plaintiff's expert in orthopedic surgery, Dr. Davne, "dehiscence is a fancy word for separation of the wound." [Tr. 146/19-20.]

[3] Per testimony of Defendant Frisch's expert in infectious diseases, Dr. Dailey: "A seroma is a pocket of fluid that's somewhere along the tract of the wound." [ROA ___; Tr. 778/25 – 779/1.]

When the Plaintiff Patient was admitted, Dr. Frisch requested a consultation with Dr. West, an infectious disease specialist. Since they were assessing whether there was an abscess or a seroma, Dr. West recommended holding off on prescribing any antibiotic until they had more information from cultures and a decision about surgery. [ROA ___; Def. Ex. 32.]

On September 22, 2016, Dr. Frisch performed an incision and drainage of the lumbar spine during which he found a pocket of purulent material over the previous surgical decompression site. It was cultured and he performed an extensive incision and debridement ("I&D"). [ROA ___; Def. Ex. 39.] A culture ultimately was reported as evidencing methicillin-resistant *Staphylococcus aureus* ("MRSA"). [ROA ___; Def. Ex. 35.] An IV antibiotic [vancomycin 1gm] was administered in the operating room. [ROA ___; Def. Ex. 44.] After surgery, as ordered by Dr. West, the Plaintiff received IV vancomycin 1.25 gm every 12 hours for three days and an additional dose on September 26, 2016 prior to her discharge. [ROA ___, ___; Def. Ex. 48, 116.] At the time of her discharge, she was given a prescription written by Dr. West for minocycline 100 mg one capsule to be taken twice daily for 14 days. [ROA ___; Def. Ex. 54. See also ROA ___; Def. Ex. 53.]

Patient was seen at Southeastern Spine for follow-up visits on October 11, 2016 and November 28, 2016. At the October visit she was seen by PA Aprill who found that she was doing well and her incision was well healed. [ROA ___; Def. Ex. 57.] At the November visit, she was seen by PA Buck with complaints of increased back pain and muscle spasms with the physical therapy. The PA recommended an updated lumbar MRI scan but the Patient declined at that time. The PA found no evidence of gross infectious process at the November 28th visit. ROA ___; Def. Ex. 59.]

The Patient was next seen by PA Aprill at Southeastern Spine on December 13, 2016 for complaints for increased back and leg pain. [ROA ___; Def. Ex. 62.] An MRI on December 16th showed "exuberant granulation tissue on the left at L4-5 and there is apparent residual lateral recess stenosis with probable compression of the left L5 root." [ROA ___; Def. Ex. 63.] Dr. Frisch met with the Patient and her husband on December 16th and discussed the MRI results and treatment options. [ROA ___; Def. Ex. 64.] He gave her the option of admission to the hospital for an infectious workup and consultation with Infectious Disease; however, she chose to wait to see if an increased medication dosage would help better control her pain.

After the Plaintiff Patient contacted Dr. Frisch's office on December 19, 2016, she was admitted to the hospital on for evaluation and infectious disease workup. [ROA ___; Def. Ex. 65.] Blood cultures showed methicillin-resistant *Staphylococcus aureus*. [ROA ___; Def. Ex. 78.] A CT scan and MRI both showed osteomyelitis (a bone infection). [ROA ___, ___; Def. Ex. 72, 74.] While she was hospitalized, Dr. Frisch again consulted the infectious disease specialist, Dr. West, who ordered IV antibiotics via a PICC line. [ROA ___; Def. Ex. 83.] She was discharged on January 3, 2017 with a PICC line and an order (per Dr. West) for three months of IV vancomycin and erythromycin. [ROA ___; Def. Ex. 84.]

The Patient was seen at Southeastern Spine in March 2017 by PA Aprill for follow-up at which time she was still being followed by the infectious disease physician and receiving IV antibiotics. [ROA ___; Def. Ex. 87.] When she was seen by PA Aprill in August 2017, the Patient had completed her antibiotics but she still was having difficulty with standing or walking and she had filed for long-term disability. [ROA ___, ___; Def. Ex. 90, 91.]

In July 2017, the Patient was referred to a neurosurgeon at Duke (Dr. Grossi) by her primary care physician (Dr. Harkins) for evaluation of her back pain. He noted that she had improved since

her post-surgery infection and that she had fairly mild back and left sided leg pain. X-rays taken at that visit showed "an almost complete collapse of the disc space at L4-5, there is a loss of anterior height and slight focal kyphosis lo the L4-5 level, however she still has relatively reasonable preserved lumbar lordosis." Dr. Grossi concluded: "Obviously, since she is doing fairly well at this point. I would not recommend any surgical intervention at this point." [ROA ___; Pl. Ex. 116.]

Allegations and Evidence of Medical Negligence

The Plaintiffs have made no allegations nor presented any evidence of negligence in connection with the surgery performed by Dr. Frisch on August 2nd. Plaintiffs' expert in the field of orthopedic surgery had no criticisms of the August 2nd surgery. [ROA ___, ___; Tr. 186/17-19, 189/13-15.]

The Plaintiffs have not made any allegations nor presented any evidence of negligence in connection with the I&D procedure Dr. Frisch performed on September 22nd. Plaintiffs' orthopedic surgery expert also testified that the I&D procedure was appropriate and met the standard of care. [ROA ___; Tr. 149/11-17.] Plaintiff's expert also testified that he had no criticisms of Southeastern Spine about the care and treatment of the Patient while she was hospitalized during that September admission. [ROA ___; Tr. 152/7-13.]

Rather, the Plaintiffs allege that Dr. Frisch was negligent in failing to promptly diagnose and treat the Patient's post-operative wound infection, and in failing to prescribe a sufficient course of IV antibiotics to effectively treat her post-operative wound infection. More specifically, the Plaintiffs allege that Dr. Frisch should have taken the Patient back to surgery on August 30th instead of waiting until September 22nd. They also allege that Dr. West should have ordered IV antibiotics when she was discharged on September 26th, and Dr. Frisch should have overridden Dr. West's

prescription for the oral antibiotic and insisted on IV antibiotics upon discharge. They allege that the delay and oral medication allowed the MRSA infection to progress to the bone infection which caused her permanent damage at her L4-L5 discs.

Plaintiffs' Expert in the Field of Orthopedic Surgery – Dr. Davne

The Plaintiffs presented testimony from Dr. Davne who was qualified as an expert in the field of orthopedic surgery without objection. [ROA ___; Tr. 118/17-22.] Dr. Davne opined that Dr. Frisch should have taken the Plaintiff patient back to surgery on August 30th: "So in my opinion, she should have been returned to the operating room on 8/30." [ROA ___;Tr. 142/24-25. *See also* ROA ___; Tr. 178/13-14. ROA ___; Tr. 178/22 -179/1].

Although Dr. Davne acknowledged that he was not an expert in the field of infectious disease,[4] he opined that the Patient should have been sent home on IV antibiotics: "[I]t's my opinion that the standard of care required at a minimum seven to 10 days of intravenous antibiotics." [ROA ___; Tr. 154/3-5. See also ROA ___; Tr. 153/20-21]. In addition, while Dr. Davne acknowledged that it was Dr. West – the infectious disease consultant –who ordered the discharge antibiotic[5], he still opined that Dr. Frisch should have opposed Dr. West's prescription for oral antibiotic and insisted that she receive IV antibiotics when she was discharged on September 26th. [ROA ___, ___; Tr. 179/5-10, Tr. 179/23-25.] In striking contrast, however, Dr. Davne testified that "there's always an infectious disease doctor that comes in when it's an MRSA infection." [ROA ___; Tr. 153/15-16. See also ROA ___; Part 2 - Tr. 14/1-2 "for MRSA infection, it would always be referred to infectious disease."] Dr. Davne further testified that the choice of antibiotic should be made by an infectious disease when it's a case of MRSA: "[T]he specific

[4] [ROA ___; Tr. 187/10-19.]

[5] [ROA ___; Tr. 153/1-6.]

antibiotic you would rely on the judgment in general of the infectious disease doctor as to what antibiotic would be chosen, because they have a greater level of expertise in treating MRSA infections as to what -- which antibiotic you would choose." [ROA ___; Tr. 156/11-15. See also ROA ___; Part 2 - Tr. 12/20-24 -- "MRSA is handled by infectious diseases."]

Ultimately, to clarify and focus his expert opinion, Dr. Davne testified:

> [Q] So the jury is clear then in terms of your testimony as an orthopedic surgeon about deviations from the standard of care they have to do with August 30th, and that point should have gone back to surgery, and then on September 26th he should have insisted on IV antibiotics?
>
> A. That's correct. [ROA ___; Tr. 179/19-25.]

Plaintiffs' Expert in the Field of Infectious Disease – Dr. Blass

Plaintiffs also presented opinion testimony from Dr. Blass who was qualified as an expert in the field of infectious disease, and treatment of patients, both pre- and post-operatively. [ROA ___; Part 2 - Tr. 26-27.] Dr. Blass opined that the doses of vancomycin administered to the Patient while she was in the hospital were "reasonable and prudent," but she needed a longer duration: "I think it was very reasonable and prudent to give those eight doses. I'm not -- I'm not --I'm not of the opinion that those initial doses were substandard of the care. I think they were. The extent of the problem required a more -- a --a -- a longer duration of effective antimicrobials that could be used in a similar circumstance for a deep infection." [ROA ___; Part 2 - Tr. 66/12-17. See also ROA ___; Part 2 - Tr. 92/15-18.] He also opined that the prescription for minocycline Dr. West gave the Patient on discharge was "inadequate" and "insufficient" and it violated the standard of care. [ROA ___; Part 2 - Tr. 64/15-21.] In addition, Dr. Blass opined that the I&D was an appropriate procedure, but he acknowledged that he was not an orthopedic surgeon, and he was not offering any opinion on the timing of the I&D: "I'm not going to tell the surgeon when to

operate. I'm not a surgeon. I don't intend on doing a surgical residency, so I'm not going to be critical of a surgeon's standard of care." [ROA ___; Part 2 - Tr. 84/3-5, Tr. 116/18-21.]

Defendant Dr. Frisch's Expert in the Field of Orthopedic Surgery – Dr. Glaser

Defendant Dr. Frisch presented Dr. Glaser as an expert in the field of orthopedic surgery and he was so qualified without objection. [ROA ___; Tr. 705-06.] He opined that Dr. Frisch complied with the standard of care throughout his care and treatment of the Patient. [ROA ___; Tr. 721/1-5, 757/11-20.] More specifically, he opined that it was appropriate for Dr. Frisch to admit the Patient on September 20th. [ROA ___; Tr. 715/20-24.] As to the discharge prescription, Dr. Glaser testified that he would defer any opinion on the choice of the antibiotic and the length of dose to an infectious disease expert. [ROA ___; Tr. 725/19-23. See also ROA ___; Tr. 749/14-22.] However, Dr. Glaser did opine that Dr. Frisch complied with the standard of care in allowing the Patient to be discharged with the antibiotic prescription from Dr. West: "[H]e had gotten an infectious disease consult and this was dictated by the infectious disease consult. I think that's an appropriate response from Dr. Frisch." [ROA ___; Tr. 717/3-10.] He further testified that there were no "red flags" for an orthopedic surgeon to second guess the infectious disease consultant or get a second consult. [ROA ___; Tr. 717/11-16.]

Defendant Dr. Frisch's Expert in the Field of Infectious Disease– Dr. Dailey

Defendant Dr. Frisch also presented testimony from Dr. Dailey, who was qualified without objection as an expert in the field of infectious disease. [ROA ___; Tr. 773/20-25.] Dr. Dailey opined that, from an infectious disease perspective, there was no need for surgery before the September 20th admission. [ROA ___; Tr. 783/14-20.] He also opined that there was no reason for Dr. Frisch to intervene in Dr. West's plan. [ROA ___; Tr. 776/12-20.]

Dr. Dailey testified that the IV vancomycin administered during hospitalization was appropriate and that the duration/number of doses was appropriate. [ROA ___; Tr. 786/20-25, 787/11-13.] He also testified that the discharge prescription for minocycline twice a day for 14 days was appropriate and met the standard of care. [ROA ___; Tr. 787/24 – 788/7.]

Defendant Dr. West's Expert in the Field of Infectious Disease – Dr. Simmons

Dr. West presented testimony from Dr. Simmons, who was qualified as an expert in infectious diseases without objection. [ROA ___; Tr. 925/15-21.] Dr. Simmons opined that Dr. West's treatment of the Patient during her September 2016 hospitalization met the standard of care. [ROA ___; Tr. 926/20-25.] More specifically, he testified that the order for vancomycin was appropriate because she had MRSA, and that the duration of the IV antibiotic met the standard of care. [ROA ___; Tr. 929/11-18.] Dr. Simmons also opined that the discharge order for oral minocycline was appropriate. [ROA ___; Tr. 929/18-25.]

ARGUMENT

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN PRECLUDING THE DEFENDANT DR. WEST FROM READING PARAGRAPH 7 FROM THE IDSA GUIDELINES TO THE JURY.

Standard of Review of Evidentiary Rulings

The Appellate Court applies an abuse of discretion standard when reviewing a trial court's ruling on the exclusion of evidence under the South Carolina Rules of Evidence. State v. Wallace, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023). The Appellate Court will not reverse a trial court's evidentiary ruling unless it finds the trial court has not acted within the discretion granted to trial courts. *Id.* "[A] trial court acts outside of its discretion when the ruling is not supported by the evidence or is controlled by an error of law." *Id.* Even if the Appellate Court finds an abuse of

discretion, the Court will not reverse unless the error caused prejudice. State v. Davis-Kocsis, 443 S.C. 127, 136, 903 S.E.2d 491, 495 n.2 (2024).

However, the necessary predicate to any question of the standard of review is whether the issue being raised on appeal has been preserved for appellate review.

> There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002).

S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007). *See also* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Malloy v. Thompson, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.")

Summary of Argument

The sole issue raised by the Plaintiffs in this appeal arises from an evidentiary ruling during the cross examination of Defendant Dr. West. During his direct examination, Dr. West testified regarding the existence of certain guidelines issued by the Infectious Disease Society of America (IDSA) regarding MRSA. In particular, he testified that, in the circumstances presented with this Patient during the September 2016 hospitalization, the applicable IDSA guideline recommends giving seven to 14 days of antibiotics, and that he followed those guidelines. [ROA ___; Tr. 861-62.] On cross examination, the Plaintiffs questioned Dr. West regarding the specific section (Paragraph 5) dealing with a class of complicated skin and soft-tissue infection upon which he had relied. [ROA ___; Tr. 904.] Then the Plaintiffs began to question Dr. West regarding a different

section of the IDSA Guidelines – Paragraph 7 – regarding hospitalized patients with complicated surgical site infections. [ROA ___; Tr. 905.] When Dr. West began reading from that paragraph, Counsel for Dr. West objected on hearsay/Rule 801 grounds. [ROA ___; Tr., 905/7-11.] The Trial Court sustained the hearsay objection, struck the question and answer, and instructed the jury not to consider it. [ROA ___; Tr. 905/21-24.]

The Plaintiffs state the issue they are presenting on appeal as: "Whether the circuit court erred in preventing the defendant infectious disease physician from reading on cross-examination treatment guidelines from a learned medical treatise the physician relied on during his direct examination and admitted was a reliable authority." [Appellants' Initial Br. p. 1.] They articulate their arguments as: "The IDSA guideline section the circuit court excluded was admissible under the learned treatise hearsay exception;" and that "Permitting Dr. West to introduce one portion of the IDSA guidelines and to prevent admission of an adjacent portion is fundamentally unfair and deprived the jury of essential context." [Appellants' Initial Br. pp. 8, 13.]

As a threshold question of issue preservation, the record shows that the Plaintiffs did not preserve the evidentiary issue they are raising on appeal. When the Defense made the hearsay objection, the Plaintiffs did not offer any argument that the learned treatise exception found in Rule 803(18) applies nor did they offer any argument that the Rule 106 rule of completeness applied to allow Dr. West to read Paragraph 7 to the jury. Moreover, the Plaintiffs did not make any proffer of the full text of Paragraph 7. As to the merits of the hearsay ruling, the Trial Court acted within its discretion in sustaining the objection because the text of Paragraph 7 was hearsay that did not fall into the learned treatise exception on Rule 803(18) nor the rule of completeness found in Rule 106.

In addition, the Plaintiffs cannot argue that the hearsay ruling, even if error, caused them any prejudice because they affirmatively told the Trial Court they did not ask for Paragraph 7 to be read and because they never attempted to question any of the experts about Paragraph 7. Further, the Plaintiffs were allowed to fully question Dr. West about Paragraph 7 and his testimony established that Paragraph 7 only applied to hospitalized MRSA patients. Thus, since the Plaintiffs had not alleged or offered any proof that Dr. West's in-patient medication orders breached any standard of care, there is no reasonable probability the jury's verdict was influenced by the exclusion of the text of Paragraph 7. Ultimately, there is no reasonable probability that the jury's verdict in favor of Dr. Frisch – the orthopedic surgeon – was influenced by the exclusion of the alleged evidence of a breach of the IDSA Guidelines which guide the infectious disease physicians as to what antibiotics should be ordered to treat MRSA in various circumstances.

The only conclusion the jury could reasonably reach from all the expert testimony is that Dr. Frisch met his standard of care by arranging for an infectious disease consultant to treat the Patient's MRSA infection, and there was no reason for him to second guess or override Dr. West's medication plan to discharge the Patient with a prescription for oral antibiotics. For each and all of these grounds, there is no ground to reverse the jury's verdict in favor of Dr. Frisch and Southeastern Spine, and the judgment should be affirmed.

I. THE EVIDENTIARY ISSUE RAISED ON APPEAL WAS NOT PRESERVED AT TRIAL.

In addition to the general common law issue preservation rules noted above, Rule 103 of the South Carolina Rules of Evidence clearly establishes the requirements for preserving an evidentiary issue for appellate review:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

"[T]he South Carolina Rules of Evidence state that an error may not be found for the wrongful admission of evidence unless "a timely objection *or* motion to strike appears of record." Rule 103(a)(1), SCRE (emphasis added)." State v. Byers, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011). "For an admissibility error to be preserved, the objection must include a specific ground "if the specific ground was not apparent from the context." *Id*. at 59. "A party need not use the exact name of a legal doctrine ..., but it must be clear the argument has been presented on that ground." *Id*. (citation omitted).

While the party interposing a hearsay objection bears the burden of showing that the evidence constitutes hearsay. if the court rules that the evidence is hearsay, the proponent of the hearsay then must establish that it is not hearsay or that the hearsay falls into an applicable hearsay exception. See 30B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 6712, 6803 (2024 ed.); *see also* Marshall v. Thomason, 241 S.C. 84, 89, 127 S.E.2d 177, 179 (1962) (proponent of hearsay under exception bears the burden of establishing the required elements). Where an appellant makes no argument at trial that the proffered statement was either admissible as non-hearsay or admissible under an exception, the Appellate Court will not review those issues when raised for the first time on appeal. State v. Garner, 389 S.C. 61, 66, 697 S.E.2d 615, 617 (Ct. App. 2010).

A. The Plaintiffs did not make any objection to the hearsay ruling at trial.

The trial transcript shows that the Plaintiffs did not make any specific argument in response to the Defendant's hearsay objection to reading Paragraph 7:

> [Plaintiffs Counsel] Q. Okay. And -- and paragraph seven is in reference to surgical site infections, correct?
>
> [Dr. West] A. It says, "For the hospitalized patients with complicated SSTI" –
>
> [Dr. West counsel]: Objection.
>
> THE WITNESS: –- "defined as patients with deeper soft-tissue infection" --
>
> THE COURT: Basis?
>
> [Dr. West Counsel]: 801.
>
> THE WITNESS: -- surgical traumatic wound infection --
>
> [Dr. West Counsel]: 801.
>
> THE COURT: Sir.
>
> THE WITNESS: Pardon me?
>
> [Plaintiffs' Counsel]: I didn't ask him --
>
> THE COURT: There's an objection.
>
> [Plaintiffs; Counsel]: I didn't ask him to --
>
> THE COURT: The question elicited that. Sir, please don't read anything from any of those records. Thank you.
>
> Ladies and gentlemen, the last question and answer will be stricken, you're to give it no consideration in your deliberation.
>
> The objection is sustained. Hearsay.

[ROA ___; Tr. 904/25 – 905/24.]

The Plaintiffs did not argue that it was not hearsay. The Plaintiffs did not assert the learned treatise exception to the hearsay rule found in Rule 803(18). The Plaintiffs did not assert that, as

a matter of fairness, the rule of completeness found in Rule 106 allowed introduction of the full content of Paragraph 7. Rather, the Plaintiffs affirmatively asserted that they had not even asked Dr. West to read Paragraph 7, and then they just continued with questioning Dr. West about the guideline in Paragraph 7:

> Q. You agree that paragraph seven and this guideline does not identify any Tetracycline derivative as being appropriate standard of care, correct?
>
> A. You have to define that a little bit better. This is on hospitalized patients. When she was hospitalized, I gave her Vancomycin.
>
> Q. And --
>
> A. And so when she was discharged, and there's another page in here on Tetracycline's in their utility and treatment, which you've left out.
>
> Q. Sir.
>
> A. Right now. So she was hospitalized. She got the antibiotic, which was recommended for hospitalization.
>
> Q. For how long, sir, is it recommended?
>
> A. She got it for –
>
> ****
>
> THE WITNESS: She got it as an outpatient for 14 days. She got it as an inpatient for five days.
>
> BY [Plaintiffs' Counsel]:
>
> Q. How long is the standard recommend for my client to have received IV Vancomycin?
>
> A. It doesn't recommend IV antibiotics. It recommends antibiotics for seven to four -- 14 days. doesn't say IV or PO, but she was in the hospital and it usually recommend -- it recommended IV while in the hospital.

[ROA ___; Tr. 906/1- 907/2.]

> Q. The standard does not list Tetracycline or any of its derivatives for surgical site infections, correct?

A. This standard right here, this paragraph is referring to hospitalized patients. If you turn another page or two, there's several paragraphs listing the utility of using Tetracyclines.

Q. And again, seven to 14 days without IV is what the recommendation is, correct?

A. It doesn't say it says seven to 14 days of antibiotics. It doesn't say that it has to be IV.

[ROA ___; Tr. 908/11-20.]

B. The Plaintiffs did not make any proffer of Paragraph 7.

As required by Rule 103, when a trial judge excludes evidence, the party must make an offer of proof of the excluded evidence. A failure to make a proffer precludes appellate review. Otis Elevator, Inc. v. Hardin Const. Co. Grp., 316 S.C. 292, 298, 450 S.E.2d 41, 44 (1994); TNS Mills, Inc. v. S.C. Dep't of Rev., 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998). "Unless a party includes an offer of proof in the record, there is nothing for us to review." Honea v. Prior, 295 S.C. 526, 534, 369 S.E.2d 846, 851 (Ct. App. 1988) (citing Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct.App.1986)); Ellison v. Parts Distributors, Inc., 302 S.C. 299, 302, 395 S.E.2d 740, 741–42 (Ct. App. 1990).

The transcript does contain a portion of Paragraph 7 as read by the witness before the Trial Court stopped his reading and ordered the question and answer stricken. The transcript, as quoted above, does provide a limited description of the topic of Paragraph 7: "For the hospitalized patients with complicated SSTI" – "defined as patients with deeper soft-tissue infection" – "surgical traumatic wound infection." However, the Plaintiffs never made any effort to make a proffer of the full text of Paragraph 7 by making it a court exhibit or reading into the record.

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The record shows that the issue raised by the Plaintiffs in this appeal and the arguments found in their appellate brief were never preserved in the Trial Court and they cannot be presented for the first time on appeal. Moreover, without a sufficient offer of proof of Paragraph 7, there is nothing for the Appellate Court to review. Accordingly, the judgment entered in favor the Defendants Dr. Frisch and Southeastern Spine should be affirmed.

II. PARAGRAPH 7 OF THE IDSA GUIDELINES WAS PROPERLY EXCLUDED AS HEARSAY.

A. Paragraph 7 of the IDSA Guidelines is hearsay.

Rule 802 of the South Carolina Rules of Evidence (the Hearsay Rule) provides that: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." As defined in Rule 801(c), SCRE: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The Plaintiffs argue on appeal that Paragraph 7 of the IDSA guideline is not hearsay because it is not offered for the truth of the matter asserted, but only to challenge the witness' credibility. [Appellants' Initial Br. p. 8[6].] As discussed above, this argument is not preserved for appeal because the Plaintiffs never made the argument in the trial court, and even if the argument was preserved, it has no legal foundation.

The very existence of the learned treatise exception found in Rule 803(18) is based on the premise that a medical text is hearsay. Moreover, the law is long settled that medical books are hearsay:

> May medical books be read to the witnesses, or to the court, or to the jury? To read such a book to the court or the jury is to make of the author of the book a witness

[6] "First, the disputed section of the guidelines did not qualify as "hearsay" because it was not offered for its truth. Instead, the McGougans were using the guidelines to impeach."

> for the party introducing it, which witness the other party has no opportunity to cross examine. In addition, it is hearsay testimony.

Edwards v. Union Buffalo Mills Co., 162 S.C. 17, 159 S.E. 818, 819–20 (1931). "It is well settled by our decisions that, ordinarily, medical books are not admissible in evidence to be read to the court and to the jury, except in certain cases allowed by statute." LaCount v. Gen. Asbestos & Rubber Co., 184 S.C. 232, 192 S.E. 262, 266 (1937).

The Plaintiffs rely on the opinion in Baker v. Port City Steel Erectors, Inc., 261 S.C. 469, 200 S.E.2d 681 (1973), as supporting their argument that Dr. West should have been allowed to read the text of Paragraph 7 to challenge his credibility. However, the Baker decision is distinguishable and actually supports the Trial Court's ruling. In that case, the issue before the Court was whether it was error to permit the defendants to cross-examine the plaintiff's expert witness from a scientific textbook with which the expert was unfamiliar. In ruling that there was no error, the Court considered a line of appellate decisions which held that it is a violation of the hearsay rule to use scientific treatises in the cross-examination of an expert witness, where the effect is to permit the jury to consider the treatise as direct proof of an issue in the case. However, the Court found that those decisions was not applicable because "the scientific textbook was used in cross-examination of the expert solely for purposes of testing the reliability of one of the factors used by him in analyzing the accident and not as direct proof of any issue in the case." Id. at 682-83. The Court held that "the limited use of the textbook solely for impeachment of the expert witness was not error." Id.

Here, however, the Plaintiffs' attempt to use Paragraph 7 was not limited to demonstrate Dr. West's treatment decision-making nor was it limited to impeachment of an expert opinion regarding his analysis. Rather, the record shows that the Plaintiffs were attempting to prove that he did not comply with the standard of care set in Paragraph 7. Moreover, in their appellate brief,

the Plaintiffs directly argue that they were denied the right to prove that Dr. West did not comply with the standard of care: "Dr. West got to claim he met their requirements and complied with the standard of care, but the McGougans were denied the chance to show otherwise." [Appellants' Initial Br. pp. 7-8.] Throughout their brief, the Plaintiffs repeatedly argue about the IDSA Guidelines as establishing the standard of care:

- "[T]he important role a document like the IDSA guidelines can have in evaluating the performance of a professional like Dr. West. Courts have long recognized industry safety standards are important evidence to establish the standard of care in a negligence claim." [Appellants' Initial Br. p. 16.]
- "[T]he country recognize the IDSA guidelines not just as relevant to the standard of care for medical providers but as fully stating the standard of care for addressing a patient's infection." [Appellants' Initial Br. p. 16.]
- "A retained expert offering his/her opinion on the standard of care is probative evidence, but it is no substitute for the rhetorical and persuasive power of an objective industry standard compelling a course of conduct." [Appellants' Initial Br. p. 17.]
- "The wrongfully excluded evidence concerned the proper course of antibiotics for a hospitalized patient with a complex surgical site infection (Tr. 905, lines 3-6). That evidence was directly related to the standard of care Dr. West was required to meet in his role as Ms. McGougan's infectious disease physician. Dr. West's compliance with the standard care was an issue the jury was required to reach." [Appellants' Initial Br. p. 18.]
- "[T]he IDSA guidelines are a crucial factor in defining an infectious disease physician's standard of care, and Paragraph 7's contents were directly on point for this case." [Appellants' Initial Br. p. 18.]

- "In sum, the wrongful exclusion of Paragraph 7 of the IDSA guidelines from evidence was a prejudicial error because it concerns Dr. West's standard of care, a crucial issue in the case." [Appellants' Initial Br. p. 19.]

In support of their argument for allowing the reading of Paragraph 7 for impeachment, the Plaintiffs also cite to a New York appellate decision in Hinlicky v. Dreyfuss, 848 N.E.2d 1285 (N.Y. 2006), as holding that the learned treatise exception can be applied to cross examination of a treating physician. However, that decision also is distinguishable. There, the defendant anesthesiologist testified that he had followed a set of clinical guidelines and he identified a diagram he used to evaluate whether his patients needed preoperative cardiac evaluation. When the defendant moved to have the diagram being entered into evidence, the trial court allowed the diagram to be admitted as demonstrative evidence of the steps he had followed in clearing the patient for surgery. The appellate court considered that it was not admitted to establish a standard of care and also noted that the plaintiff did not request any limiting instruction on the use of the diagram.

The common distinguishing point in the Baker and Hinlicky opinions is that the learned treatise hearsay was not being used to prove the standard of care. In view of the arguments found in the Plaintiffs' appellate brief, there is no doubt that the Plaintiffs wanted to use Paragraph 7 to establish the standard of care. Thus, the Trial Court correctly held that it was hearsay.

B. The Learned Treatise Exception as found in Rule 803(18), SCRE, would not apply because Dr. West was not qualified as an expert.

The issue addressed by the Court in LaCount v. Gen. Asbestos & Rubber Co., supra, was the permissible use of medical articles to impeach the expert witnesses who had actually written the articles. In this case, Dr. West did not write the IDSA guidelines so that ruling does not provide any foundation for allowing the Plaintiffs to introduce the hearsay in ISDA Paragraph 7. A version

of the common law exception considered in LaCount now is found in Rule 803(18), SCRE, which provides the learned treatise exception to the hearsay rule:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ****
>
> (18) Learned Treatises. To the extent called to the attention of an ***expert witness*** upon cross-examination or relied upon by the ***expert witness*** in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. This rule is in addition to any statutory provisions on this subject. [Emphasis added.]

As discussed above, since the Plaintiffs did not raise the learned treatise exception when the Defendant's hearsay objection was asserted, they did not preserve this issue for appellate review.[7] In any event, by the literal language of the Rule, this exception does not apply because Dr. West was not identified or qualified as an expert witness – he was testifying as a treating physician.

In support of their position that Dr. West should be considered an expert, the Plaintiffs cite to Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986). However, that decision did not involve the learned treatise exception and does not support any conclusion that the Trial Court erred in precluding Dr. West from reading Paragraph 7 to the jury. In Ward v. Epting, the defendant physician argued that the trial court erred in admitting evidence during her cross examination that she had twice failed to become a board-certified specialist in anesthesiology. The Court held that the fact she was not board certified was relevant to impeach her credibility since she offered

[7] It should be noted that the transcript shows that the proper use of Rule 803(18) already had been discussed during a colloquy regarding the testimony of Dr. Frisch's expert in orthopedic surgery (Dr. Glaser). [See ROA ___; Tr. 745-46.]

medical opinions about causation.[8] In contrast, here, Dr. West did not offer any expert opinions, rather, he only testified to his treatment decisions.

It appears necessary to clarify Dr. West's testimony about the IDSA Guidelines. In their appellate brief, the Plaintiffs represent that Dr. West told the jury that "he 'followed' and 'exceeded' the requirements stated in Paragraph 7 of those guidelines in the course of treatment he chose for her. (Tr. 861, line 20 – 862, line 19)." [Appellants' Initial Br. p. 8.] Dr. West did testify on direct examination as to the existence of the 2011 IDSA Guidelines for treatment of MRSA and sated that he followed the guideline for skin soft-tissue infection: "[T]he recommendations was to give seven to 14 days of antibiotics. It didn't -- and she -- we followed the guidelines. In fact, we did exceed them because she did get eight doses of Vancomycin early. So she really received around 19 days of antibiotics, including the -- the Minocycline." [ROA ___; Tr. 862/15-20.] However, Dr. West did not identify Paragraph 7. On cross examination, Dr. West was questioned about the IDSA Guidelines, and he testified that he was referring to "a class of complicated skin and soft-tissue Infection" and he specifically identified Paragraph 5, reading: "Well, down here on paragraph five, it says, "For empirical coverage of MRSA and outpatients with skin soft- tissue infections, oral antibiotics options include the following, Clindamycin, Trimethoprim/Sulfamethoxazole, Tetracycline and Linezolid." [ROA ___; Tr. 904/9-24.] When Plaintiffs moved on to question Dr. West about Paragraph 7, the Trial Court stopped him from reading the full text of that Paragraph. Notably, however, when the Plaintiffs continued their cross examination, Dr. West explained that Paragraph 7 applied to hospitalized patients and he gave her

[8] "She gave her opinion to a reasonable degree of medical certainty as to how air got into Mrs. Ward's stomach, and when the tube moved into the esophagus. On cross-examination she gave her opinion that Mrs. Ward had a bronchospasm in the lower part of the lungs." 351 S.E.2d at 872.

vancomycin during her hospitalization as recommended by that Guideline. [ROA ___; Tr. 906/1-13.]

On appeal, the Plaintiffs cite to Mizell v. Glover, 351 S.C. 392, 403-04, 570 S.E.2d 176, 182 (2002), one of the few South Carolina appellate opinions on Rule 803(18), with a parenthetical comment that "finding circuit court properly applied Rule 803(18), SCRE in permitting questioning about medical article and allowing article to be read during questioning)." [Appellants' Initial Br. p. 13.] However, in that case, the defendant treating podiatrist was not the expert witness in issue. At trial, the defendant podiatrist called another podiatrist, to testify as an expert who testified that the defendant had not breached the standard of care. The plaintiffs claimed that the expert's testimony conflicted with an article he wrote and on cross-examination, they sought to introduce the chapter from the podiatric textbook in which the expert's article appeared. The trial court ruled the document inadmissible, but allowed the plaintiffs' counsel to cross-examine the expert extensively about his article, and allowed portions of the article to be read in the questions. The Appellate Court held that it was proper for the trial court to deny admission of the article as an exhibit, but to allow the plaintiffs to cross-examine the expert regarding the article and to publish portions of it through their questions. This opinion does not support the use of Rule 803(18) in cross examination of a treating physician who is not proffered or qualified as an expert.

The Plaintiffs have cited to several court rulings from other jurisdictions regarding expert opinions by treating physicians, but none of them support the issue presented in this appeal. Plaintiffs cite Rowland v. Novartis Pharm. Corp., 9 F. Supp. 3d 553, 556 (W.D. Pa. 2014) for the proposition that ""treating physicians' opinions on prognosis and causation are inherently expert testimony." [Appellants' Initial Br. p. 12.] That statement by the district court was made in ruling

on a defendant's motion in limine to exclude testimony of treating physicians the plaintiff was planning to offer as expert witnesses on the topic of specific causation. Ultimately, the district court ruled that it would not allow certain of plaintiff's treating physicians to give expert opinions on causation and limited their testimony to their care and treatment of Plaintiffs based on their personal knowledge and examinations.

Plaintiffs also cite Montoya v. Sheldon, 286 F.R.D. 602, 613-14 (D.N.M. 2012) for the proposition that "treating physician's opinions regarding diagnosis of a medical condition is almost always expert testimony." [Appellants' Initial Br. p. 12.] While the district court did so state that language, the court actually did not allow the treating physician to offer any expert testimony. The district court's order related to the plaintiff's motion to supplement discovery to name a treating physician (who had treated the plaintiff for a mental condition) as an expert and considered the implications of Rule 26(a)(2), Fed.R.Civ.P., governing identification of expert witnesses and Rule 701, Fed.R.Evid, governing a treating physician's lay testimony. The district court ruled that the treating physician could not testify to any diagnosis, and could only testify only as a lay witness as to the facts of her treatment.[9]

Lastly, the Plaintiffs cite to Langston v. Kidder, 670 So.2d 1, 4 (Miss. 1995) for the proposition that a defendant treating physician is offering expert opinion if he "testif[ies] to industry standards and whether the defendant met those standards." First, the defendant in that case was not a treating physician. The defendant witness was an employee/officer of the defendant trucking case in a case arising from a farm accident, and the Mississippi appellate court held that

[9] "Because Dr. Bath is providing testimony as a lay witness under rule 701, she can testify only to the facts of D. Montoya's treatments and lay opinions formed at the time of her treatment of D. Montoya, but such opinions may not be based on scientific, technical, or specialized knowledge. She cannot, therefore, testify to any diagnosis of D. Montoya's mental health issues or their cause." Id. at 621.

the trial court erred in overruling the plaintiff's objection to the witness offering expert testimony because the witness had not been identified as an expert witness in discovery responses. Nothing in that opinion is relevant to the issue being raised by the Plaintiffs in this appeal.

III. RULE 106, SCRE, WOULD NOT HAVE REQUIRED THAT DR. WEST BE ALLOWED TO READ THE LANGUAGE FROM PARAGRAPH 7 OF THE IDSA GUDELINES.

Plaintiffs argue, for the first time on appeal, that the Trial Court should have allowed Dr. West to read the full text of Paragraph 7 under the rule of completeness found in Rule 106, SCRE, which provides:

> When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Plaintiffs contend that since Dr. West had read Paragraph 5, they should have been afforded the opportunity to have the jurors hear Paragraph 7. As discussed above, this issue was not preserved at trial. Moreover, the Trial Court's hearsay ruling did not contravene this rule of completeness.

In State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998), the Supreme Court considered the purpose and application of Rule 106, with reliance on the comparable Federal Rule, stating: "Rule 106, Fed.R.Evid., is based on the 'rule of completeness' and seeks to avoid the unfairness inherent in 'the misleading impression created by taking matters out of context'." 508 S.E.2d at 876 (citations omitted). The Court also discussed that while technically Rule 106 applies where a writing in introduced into evidence, as a matter of fairness and completeness, it also can be applied where a party's use of a writing is "tantamount to the introduction of the [document] into evidence." *Id*. (citation omitted.) The Court also addressed limits on the use of Rule 106:

> Where Rule 106, SCRE, applies, it does not require all of the document to be introduced, merely "*any other part* of any other writing or recorded statement *which*

> *ought in fairness to be considered contemporaneously with it.*" (emphasis added). Only that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced.

Id. More recently, the Court of Appeals considered Rule 106 in State v. Oglesby, 384 S.C. 289, 294, 681 S.E.2d 620, 622 (Ct. App. 2009), and addressed the point that application of that Rule is limited to a portion needed for clarification of the admitted portion:

> As it relates to this case, Rule 106, SCRE, stands for the proposition that when a part of a recorded statement is introduced, the opposing party may require the admission of other portions to ensure the partial statements are not taken out of context. However, only that portion of the remainder of any statement which explains or clarifies the previously admitted portion should be allowed into evidence. Rule 106, SCRE, seeks to avoid the unfairness inherent in the misleading impression created by taking a conversation out of context.. [Citations omitted.]

The reading of Paragraph 5 did not require the reading of Paragraph 7 where they were separate guidelines applying to different circumstances. As Dr. West explained, when the Plaintiffs continued their cross examination, Paragraph 5 applied to outpatient oral medications for MRSA in contrast to Paragraph 7 that applied to hospitalized MRSA patients. Since the Plaintiffs made no allegations and offered no proof that Dr. West deviated from the standard of care in the antibiotics ordered and given during the September 2016 hospitalization, Rule 106 did not require that Paragraph 7 be read to clarify Paragraph 5.

IV. THE PLAINTIFFS HAVE FAILED TO MAKE ANY SHOWING THAT THE HEARSAY RULING PREJUDICED THEIR CLAIM AGAINST DEFENDANT DR. FRISCH.

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).[10] To prove prejudice,

[10] *Overruled on other grounds by* State v. Wallace, 440 S.C. 537, 892 S.E.2d 310 (2023).

the appellant first must make a proffer: "An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below." Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990); Ellison v. Parts Distributors, Inc., 302 S.C. 299, 302, 395 S.E.2d 740, 741–42 (Ct. App. 1990) (It is impossible to determine whether prejudice was suffered where there was no proffer.).

Under the well-settled issue preservation rules, the Plaintiffs cannot prove any prejudice when they did not make any proffer. Moreover, the Plaintiffs cannot justifiably argue they were prejudiced by the exclusion of the text of Paragraph 7 when they affirmatively asserted that they had not even asked Dr. West to read Paragraph 7, and the Plaintiffs actually pursued cross examination of Dr. West regarding the guidelines in Paragraph 7. [ROA ___; Tr. 905/18. ROA ___; Tr. 906.] In view of the further cross examination, presenting Dr. West from reading the text of Paragraph 7 was harmless because, in the words of the Court in LaCount v. Gen. Asbestos & Rubber Co.: "[A]s the court permitted counsel for the plaintiff to fully cross-examine these witnesses as to such articles, and the jury was thereby placed in possession of their contents." 192 S.E.at 267.

In addition, the Plaintiffs had the opportunity to develop evidence on this point during the testimony of their own infectious disease expert - Dr. Blass who testified that he consulted/considered the guidelines of the Infectious Diseases Society of America (IDSA): "[T]he Infectious Diseases Society of America, which is one of the societies that I work, that I do my best to adhere to their guidelines, they provide guidelines on the management of, and treatment of MRSA infections. And so, yes, I've looked at things like that." [ROA ___; Part 2 - Tr. 29/4-9. See also ROA ___; Part 2 - Tr. 70/12.] Dr. Blass even referred to the IDSA journal as "authoritative."

[ROA ___; Part 2- Tr. 88/22 – 89/2.] However, Plaintiffs did not elicit any discussion or opinion specifically about Paragraph 7 from Dr. Blass or any of the defense experts.

The record shows that the jury was presented with a classic battle of the experts. The Plaintiffs presented testimony from an expert in infectious diseases and an expert in orthopedic surgery. Dr. Frisch also presented testimony from an expert in infectious diseases and an expert in orthopedic surgery. Dr. West presented testimony from an expert in infectious diseases. Similar to the case in Fields, when this trial is viewed as a whole, there is nothing in the record to show that Paragraph 7 was "so crucial and important that its wrongful exclusion constitutes prejudicial error." 609 S.E.2d at 514. Thus, there is nothing in the record to show that there is a reasonable probability the jury's verdict was influenced by the lack of the text of Paragraph 7. *See* Johnson v. Horry Cnty. Solid Waste Auth., 389 S.C. 528, 536, 698 S.E.2d 835, 839 (Ct. App. 2010) (where court found that no prejudice was shown where jury was presented in a battle of the experts). The jury simply chose to believe the Defense experts, and the judgment on the jury's verdict should not be reversed on the challenge to a single evidentiary ruling that was not even preserved for appellate review. More particularly, there is no rational basis for any conclusion that the Trial Court's hearsay ruling concerning Paragraph 7 of the Guidelines of the Infectious Disease Society of America would have influenced the jury's verdict in favor of the orthopedic surgeon – Dr. Frisch and Southeastern Spine.

CONCLUSION

The Plaintiffs are asking this Court to reverse the judgment in favor of the Defendants based on the single evidentiary ruling by the Trial Court prohibiting Defendant Dr. West from reading Paragraph 7 of the IDSA Guidelines during his cross examination. However, the Plaintiffs

never objected to the Trial Court's hearsay ruling and they never made an offer of proof of the full text ` of Paragraph 7. Thus, the issue raised on appeal was not preserved for appellate review.

Furthermore, the Trial Court correctly held that reading the Paragraph would be hearsay; and as discussed above, neither Rule 803(18) or Rule 106 would be an appropriate exception to allow the Plaintiffs to present such hearsay. Even if there was any evidentiary error, it would not justify reversing the judgment because the Plaintiffs cannot show that they were prejudiced by the ruling where they made no proffer and where the Plaintiffs affirmatively told the Trial Court that they were not asking Dr. West to read Paragraph 7. Moreover, there is no basis to find a reasonable probability that the jury's verdict in favor of the Defendant orthopedic surgeon was influenced by the minor limitation on the cross examination of the Defendant infectious disease consulting physician.

WHEREFORE, based on the foregoing, there is no ground to reverse the jury's verdict and grant a new trial. Accordingly, the judgment in favor of Dr. Frisch and Southeastern Spine should be affirmed.

Respectfully submitted,

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